

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK D. LAY,

Defendant.

INDICTMENT

1:07CR 339

CASE NO.

JUDGE DOWD

Title 15, United States Code, §§ 80b-6 & 80b-17  
(Investment Adviser Fraud);  
Title 18, United States Code, Section 1341  
(Mail Fraud);  
Title 18, United States Code, Section 1349  
(Conspiracy to Commit or Attempt Fraud)  
Title 18, United States Code, Section 2 (Aiding  
and Abetting).

The Grand Jury charges:

GENERAL ALLEGATIONS

At all times material to this Indictment:

The Investor

1. The Ohio Bureau of Workers' Compensation (hereinafter "OBWC") is an Ohio agency, organized and existing under the laws of the State of Ohio.
2. Beginning in or about 1955, the OBWC began assisting Ohio-based employers

and employees to cover expenses related to workplace injuries by providing medical and compensation benefits for work-related injuries, diseases and deaths. Although its main office is located in Columbus, Ohio, the OBWC has 16 customer service offices located across the state of Ohio, including in the Northern District of Ohio. At all times relevant to the offenses charged in the Indictment, the OBWC had assets which averaged approximately 19 billion dollars and was one of the largest exclusive state-fund workers' compensation bureaus in the United States. The assets of the OBWC were under the management and control of the Chief Financial Officer and the employees of the Investment Department. The overall operation of the OBWC involved and affected interstate commerce as did the management and execution of matters regarding its financial investments.

**The Defendant MARK D. LAY**

3. MARK D. LAY (hereinafter "LAY"), during all relevant times, was Chairman, Co-CEO, principal shareholder and Chief Investment Strategist of MDL Capital Management, Inc. (hereinafter "MDL").

4. LAY founded MDL in 1992 and incorporated it under the laws of the State of Pennsylvania.

5. MDL was, at all relevant times, registered with the Securities and Exchange Commission (hereinafter "SEC") as an investment adviser under the Investment Advisers Act of 1940 ("the Act"). As an investment adviser, MDL provided investment adviser services, including but not limited to the purchase and selling of securities, to corporate, institutional and individual investors for compensation. The Act is codified in Title 15 of the United States Code.

6. Title 15, United States Code Section 80b-2(11) defines "investment adviser" as

“any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.”

**LAY’S Fiduciary Duty as an Investment Adviser to the OBWC**

7. SEC-registered investment advisers and their officers and directors have fiduciary obligations of good faith, loyalty, and fair dealing to the clients who entrust their money to the investment advisers.

8. As a registered investment adviser and fiduciary, MDL and its respective officers and employees, including LAY, were required at all times: (a) to act in good faith and in the best interests of its client, the OBWC; (b) to make full and fair disclosure of all material facts bearing on the investment adviser relationship between MDL and its client, the OBWC; and (c) to employ reasonable care to avoid misleading its client, the OBWC.

**Initial Relationship Between MDL Capital and the OBWC and The Long Fund**

9. On or about May 14, 1998, the OBWC and MDL entered into an Investment Management Agreement (“Management Agreement”), signed by LAY on behalf of MDL and by the then Administrator of the OBWC, whereby OBWC hired MDL as a fixed income investment manager.

10. The Management Agreement established MDL as an “investment adviser” as defined by the Investment Advisers Act of 1940.

11. The Management Agreement required MDL to “use its best professional judgment to manage and invest” the OBWC’s money and required MDL to “agree[] to adhere to the

standard of care and conduct required of a fiduciary under [Ohio Revised Code] Chapter 4123 and any applicable federal and state law.” At all relevant times, Ohio Revised Code Section 4123.44 stated that “fiduciaries shall discharge their duties with respect to the funds with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, and by diversifying the investments of the assets of the funds so as to minimize the risk of large losses, unless under the circumstances it is clearly not prudent to do so.”

12. Schedule A to the Management Agreement specifies that “[t]he Investment Manager accepts full fiduciary responsibility for the Bureau’s assets under its management under the Ohio Revised Code and any applicable federal and state law.”

13. Pursuant to the relationship established by the Management Agreement, from on or about May 1998 until in or about July 2003, the OBWC allocated a total of \$355 million to the management of MDL to be managed in a fund, hereinafter called the Long Fund.

14. The 1998 Management Agreement required that OBWC pay MDL a quarterly management fee. From on or about 1998 through on or about April 28, 2005, the OBWC paid MDL approximately \$1,973,797 in management fees for the Long Fund.

**The MDL Active Duration Fund, Ltd. (“ADF”)**

15. On May 2, 2002, the MDL Active Duration Fund, Ltd. (hereinafter “ADF”) was incorporated by LAY in Bermuda as an investment vehicle through which United States tax exempt investors and non-United States resident investors could invest in a portfolio consisting primarily of government, corporate and mortgage-backed fixed income securities. MDL

exercised general management and investment authority over the ADF.

16. On July 2, 2002, Bye-Laws governing the ADF were established. The Bye-Laws gave the ADF Board general management and investment authority over the ADF and provided that the ADF would be governed by a Board of Directors.

17. LAY, along with MDL's President and others known to the Grand Jury, were appointed members of the ADF Board of Directors.

18. A Bermuda-based company was named as the Administrator of the ADF.

19. On November 18, 2002, MDL entered into an Investment Advisory Agreement (hereinafter Advisory Agreement), whereby MDL was selected to be ADF's Investment Adviser.

20. Pursuant to the Advisory Agreement, the ADF delegated general authority to MDL to manage the investment of the assets allocated to the ADF and to administer the ADF's business and administrative operations, subject to the direction of the ADF's Board of Directors.

21. The Advisory Agreement referred to the ADF's Confidential Private Placement Memorandum (hereinafter "PPM"), as more fully describing the investment vehicle. Among other things, the PPM required that investor clients pay MDL both a Management Fee and an Incentive Fee. During the short life of the ADF, the sole investor client, OBWC, paid MDL approximately \$1,793,231 in such fees. The \$1,793,231 is in addition to the management fee paid for the MDL's management of the Long Fund referenced in paragraph 14 above, for a total of approximately \$3,767,028.

22. LAY and the then principal (known to the Grand Jury) of a brokerage firm located in Westlake, Ohio (hereinafter Marketer 1), each solicited the OBWC to invest in the ADF. LAY and Marketer 1 provided the OBWC with a PPM one of which bore the notation: "Copy No. 2

Issued to Great Lakes Capital Partners”, which outlined the terms and conditions of the ADF. The PPM provided that “up to 150% of the Fund’s assets, at the time of investment, may be leveraged (i.e., the combined value of borrowings and short positions).” This limitation on the utilization of leverage applied to all ADF assets, including but not limited to United States Treasury Securities. The PPM cautioned that while leverage may “enhance returns”, it may also “substantially increase the risk of loss.”

23. On August 20, 2003, OBWC agreed to invest \$100 million in the ADF. On September 12, 2003, the OBWC transferred \$100 million via electronic funds transfer to the ADF as the initial investment.

24. Despite efforts by LAY and others to market the ADF to other potential investors, the OBWC was, during all relevant times, the sole investor in the ADF.

**LAY Directed Transactions for the ADF**

25. During all relevant times, LAY directed the trade activity regarding the United States Treasury Securities in the ADF portfolio.

26. During all relevant times, LAY utilized leverage well in excess of 150% of the ADF’s assets in contravention of the terms of the January 15, 2003 PPM and in contravention of his fiduciary role as an investment adviser to act in the best interest of his client, the OBWC.

27. In directing and conducting transactions on behalf of the ADF, LAY relied upon the services of several brokerage businesses located in the Northern District of Ohio and elsewhere.

28. In the Northern District of Ohio, LAY used the brokerage services of the Westlake firm controlled by Marketer 1, which benefitted financially from ADF transactions.

29. Outside of Ohio, in the state of New York, LAY relied on several different entities to act as the prime broker and to execute trade activity.

30. LAY, others at MDL acting at the direction of LAY, and those at the various brokerage firms relied upon by LAY to trade securities for the ADF communicated via telephone, email and mail services, including the U.S. Mail and commercial carrier service.

31. LAY, others at MDL and other sources provided the OBWC with monthly and other intermittent reports on the ADF. None of these reports showed the amount of leverage exercised in the ADF.

32. After becoming concerned about a \$7 million decline in the value of the ADF, the chief investment officer ("CIO") of the OBWC met LAY in or about mid-April 2004 to discuss the loss. During that meeting, LAY did not state or admit that he had exercised leverage of approximately 900%, well in excess of the 150% limitation.

33. In mid-May 2004, the CIO of OBWC received the April 2004 month-end report on the ADF and learned for the first time that the ADF had lost \$32 million, something that LAY concealed during the mid-April meeting with the CIO.

34. At no time did LAY reveal to OBWC that the losses were magnified or caused by overleveraging, even though LAY then well knew that he routinely had exceeded the 150% limit in the PPM.

35. In or about late Spring 2004, the ADF began suffering significant losses because LAY exercised leverage above the 150% limit set in the PPM. During this time, LAY continued to conceal and misrepresent to OBWC the true nature of the leverage.

36. Despite the great loss of ADF's value and due to LAY's failure to disclose his

use of leverage in excess of 150%, on May 21, 2004, the OBWC invested an additional \$100 million in the ADF.

37. On or about May 18, 2004, after confronting LAY about the excessive leveraging being utilized in the ADF, the ADF Board of Directors decided to (a) revise the language of the PPM to allow leverage in excess of 150% regarding United States Treasury securities only; (b) to notify the OBWC that LAY had exercised leverage in excess of 150% in the ADF; and (c) to seek the OBWC's approval of LAY's continued exercise of leverage in excess of 150%.

38. On August 11, 2004, the ADF Board issued a letter to the OBWC entitled "Recent Changes to MDL Active Duration Fund, Ltd." (hereinafter Proposed Revisions Letter), purporting to notify the OBWC of LAY's past and intended use of leverage in excess of 150%. The Board of Directors requested that a representative of the OBWC sign the letter in acknowledgment of its receipt and in agreement with the change in the use of leverage.

39. The OBWC refused to permit LAY to exercise leverage in excess of 150% and, therefore, refused to execute the letter or agree to the changes to the PPM.

40. On or about September 16, 2004, the Chief Financial Officer ("CFO") and the CIO of the OBWC confronted LAY about the poor performance of the ADF, which by this time had a value of approximately \$57 million dollars, despite the \$200 million invested. During that meeting, LAY admitted having overleveraged the ADF, but even then falsely told OBWC that MDL had only leveraged approximately 900% of the ADF assets, when he then knew and should have known that leveraging exceeded 4500%.

41. By the time the OBWC discovered that the losses and decline in value of the ADF were largely due to LAY's exercise of leverage in violation of the PPM, the OBWC's investment



of \$200 million had been substantially lost.

42. On or about September 23, 2004, in order to avoid the imminent loss of all of its remaining investment in the ADF, at LAY's request, the OBWC invested an additional \$25 million into the ADF, making the total invested in the ADF \$225 million.

43. On September 29, 2004, the OBWC formally requested a redemption of its investment in the ADF by submitting a redemption notice to the ADF's administrator and requesting that the remaining balance of the OBWC's investment be liquidated and distributed to the OBWC by the end of 2004.

44. In October 2004, LAY contacted the OBWC by telephone and in person in Columbus, Ohio in an attempt to obtain further investments to enable the ADF to cover its margin calls due to LAY's excessive leveraging. The OBWC declined to invest further assets into the ADF.

45. As a result of LAY engaging in fraud and deceit upon the OBWC by using leverage well in excess of 150% and not informing the OBWC or gaining its consent to the overleveraging, the ADF and, ultimately, the OBWC suffered a large financial loss.

46. As of November 3, 2004, the OBWC was able to recover only approximately \$9 million of its \$225 million investment.

The Grand Jury further charges:

COUNT 1

(Investment Adviser Fraud: 15 U.S.C. §§ 80b-6 & 80b-17)

1. The allegations in paragraphs 1 through 46 of the General Allegations are realleged and incorporated by reference as though fully set forth herein.

2. As investment advisers registered with the SEC under the Investment Advisers Act of 1940, MDL its officers and employees, including LAY, owed fiduciary obligations of good faith, loyalty, and fair dealing to its client, the OBWC, which entrusted the OBWC's money to MDL's management. As a fiduciary, MDL and its respective officers and employees were required at all times to: (a) act in good faith and in the best interests of its client, the OBWC; (b) make full and fair disclosure of all material facts bearing on the investment advisory relationship between MDL and its respective client, the OBWC; and (c) employ reasonable care to avoid misleading its client, the OBWC.

3. In or about September 2003 through January 2005, in the Northern and Southern Districts of Ohio and elsewhere, the defendant MARK D. LAY, together with others known and unknown to the Grand Jury, including brokers and brokerages located in the Northern District of Ohio and elsewhere, unlawfully, willfully and knowingly did use and cause to be used the mails, wires and other means and instrumentalities of interstate and foreign commerce, directly and indirectly, to: (a) employ devices, schemes, and artifices to defraud, the client, the OBWC and thereby the ADF; (b) engage in transactions, practices and courses of business which operated as a fraud and deceit upon, the client, the OBWC and thereby the ADF; and (c) engage in any act, practice and course of business which was fraudulent, deceptive and manipulative, to wit: exercising leverage in excess of 150% in the ADF, in violation of the PPM.

All in violation of Title 15, United States Code, Sections 80b-6 and 80b-17.

The Grand Jury further charges:

## COUNT 2

### (Conspiracy to Commit or Attempt Mail and Wire Fraud, 18 U.S.C. §§ 1341 & 1343: 18 U.S.C. § 1349)

1. The allegations contained in paragraphs 1-46 of the General Allegations and paragraphs 1 - 2 of Count 1 of this Indictment are realleged and incorporated by reference in this Count.

2. From in or about September 2003 and continuing through in or about January 2005, the exact dates being unknown to the Grand Jury, in the Northern District of Ohio and elsewhere, the defendant MARK D. LAY did knowingly and willfully combine, conspire, confederate and agree with others known and unknown to the Grand Jury to commit offenses against the United States, namely:

- a. to commit mail fraud, in violation of Title 18, United States Code, Section, 1341; and
- b. to commit wire fraud, in violation of Title 18, United States Code, Section 1343.

### The Conspiracy Scheme

3. From in or about September 2003 and continuing through in or about January 2005, the exact dates being unknown to the Grand Jury, in the Northern District of Ohio and elsewhere, MARK D. LAY defendant herein, and others known and unknown to the Grand Jury, including other employees of MDL, other directors of the ADF and brokers assisting in or benefitting from trade activity regarding United States Treasury Securities in the ADF, having combined, conspired, confederated and agreed with each other and with others known and

unknown to the Grand Jury to devise and intend to devise a scheme and artifice to defraud the OBWC as to a material matter and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, (1) caused matters and things to be placed in any post office and authorized depository to be sent and delivered by the Postal Service, (2) caused matters to be delivered by commercial interstate carrier according to the direction thereon, and (3) caused writings, signals and sounds to be transmitted by wire in interstate and foreign commerce, for the purpose of executing and attempting to execute the scheme and artifice, as set forth in paragraphs 4-7 below.

#### Object of the Conspiracy Scheme

4. It was a purpose and object of the scheme that MARK D. LAY and other employees of MDL, other directors of the ADF and brokers assisting in or benefitting from trade activity regarding United States Treasury Securities in the ADF would fraudulently and deceitfully use LAY's role as an investment adviser to defraud, deceive and mislead the OBWC regarding the exercise of leverage in the ADF.

#### Manner and Means

5. In furtherance of the scheme to defraud, LAY and others known and unknown to the grand jury caused documents and information to be delivered and transmitted interstate, including causing documents and information to be delivered into the Northern District of Ohio from outside the State of Ohio and to be sent from the Northern District of Ohio to locations outside the State of Ohio. These documents resulted in the execution of investment transactions that caused the ADF leverage to exceed 150%.

6. In furtherance of the scheme to defraud, LAY and others known and unknown to

the Grand Jury concealed the true nature and effect of the use of leverage in excess of 150% by, among other means, failing to disclose the use of excess leverage and its effect on the OBWC investment funds to the OBWC and to others.

7. In furtherance of the scheme to defraud, LAY and others known and unknown to the Grand Jury made false statements to others regarding the alleged OBWC's knowledge of the excess leveraging and alleged OBWC's consent to excess leveraging.

**Mailings and Wire Communications**

8. In furtherance of the conspiracy, and to achieve its object, one or more of the co-conspirators committed and caused to be committed the following overt acts, among others.

9. On or about the dates set forth below, MARK D. LAY and others known and unknown to the Grand Jury executed and attempted to execute the scheme and artifice set forth above by causing and attempting to cause, in the Northern District of Ohio, Eastern Division, and elsewhere, the following matters and things to be mailed and delivered by commercial interstate carrier as set forth in each overt act below:

<b>Overt Act No.</b>	<b>Approximate Date of Mailing</b>	<b>Description of Mailing</b>
1	February 27, 2004	Trade Confirmation Statements concerning the sell of United States Treasury Bonds with maturity date of February 15, 2031 sold on February 27, 2004 by the MDL Active Duration Fund mailed from Bonds Direct Securities LLC in New York, New York to MDL Capital Management in Pittsburgh, Pennsylvania.

2	March 3, 2004	Trade Confirmation Statements concerning the sell of United States Treasury Bonds with maturity date of February 15, 2031 sold on March 3, 2004 by the MDL Active Duration Fund mailed from Bonds Direct Securities LLC in New York, New York to MDL Capital Management in Pittsburgh, Pennsylvania.
3	April 15, 2004	Trade Confirmation concerning the sell of United States Treasury Bonds with maturity date of February 15, 2031 sold on April 15, 2004 by the MDL Active Duration Fund mailed from a Pershing LLC office in Secaucus, New Jersey to the office of Great Lakes Capital Partners Ltd. in Westlake, Ohio.
4	May 11, 2004	Trade Confirmation concerning the sell of United States Treasury Bonds with a maturity date of February 15, 2031 sold on May 11, 2004 by the MDL Active Duration Fund mailed from a Pershing LLC office in Secaucus, New Jersey to the office of Great Lakes Capital Partners Ltd. in Westlake, Ohio.
5	May 27, 2004	Trade Confirmation Statements concerning the sell of United States Treasury Bonds with maturity date of February 15, 2031 sold on May 27, 2004 by the MDL Active Duration Fund mailed from Bonds Direct Securities LLC in New York, New York to MDL Capital Management in Pittsburgh, Pennsylvania.
6	July 30, 2004	Trade Confirmation Statements concerning the sell of United States Treasury Bonds with maturity date of February 15, 2031 sold on July 30, 2004 by the MDL Active Duration Fund mailed from Bonds Direct Securities LLC in New York, New York to MDL Capital Management in Pittsburgh, Pennsylvania.
7	August 17, 2004	Trade Confirmation Statements concerning the sell of United States Treasury Bonds with maturity date of February 15, 2031 sold on August 17, 2004 by the MDL Active Duration Fund mailed from Bonds Direct Securities LLC in New York, New York to MDL Capital Management in Pittsburgh, Pennsylvania.

8	August 26, 2004	Trade Confirmation concerning the sell of United States Treasury Bonds with a maturity date of February 15, 2031 sold on August 26, 2004 by the MDL Active Duration Fund mailed from a Pershing LLC office in Secaucus, New Jersey to the office of Great Lakes Capital Partners Ltd. in Westlake, Ohio.
9	September 16, 2004	Trade Confirmation Statements concerning the sell of United States Treasury Bonds with maturity date of February 15, 2031 sold on September 16, 2004 by the MDL Active Duration Fund mailed from Bonds Direct Securities LLC in New York, New York to MDL Capital Management in Pittsburgh, Pennsylvania.
10	September 17, 2004	Trade Confirmation Statements concerning the sell of United States Treasury Bonds with maturity date of February 15, 2031 sold on September 17, 2004 by the MDL Active Duration Fund mailed from Bonds Direct Securities LLC in New York, New York to MDL Capital Management in Pittsburgh, Pennsylvania.

9. On or about the dates set forth below, MARK D. LAY and others known and unknown to the Grand Jury executed and attempted to execute the scheme and artifice set forth above by causing writings, signals and sounds to be transmitted by wire in interstate and foreign commerce as set forth below:

Overt Act No.	Description of Wiring	Approximate Date of Wiring
11	Email communication from MARK LAY to broker in New York, NY during which LAY directed the New York, NY broker to pay commission to himself and LAY's Westlake, Ohio broker: "1/4 for you and greatlakes".	August 26, 2004
12	Facsimile transmission from MARK LAY to prime brokerage firm in New York, NY transmitting a two-page letter dated August 10, 2004 regarding "Recent Changes to MDL Active Duration Fund, Ltd. (The Fund)."	August 27, 2004

All in violation of Title 18, United States Code, Section 1349.

The Grand Jury further charges:

COUNTS 3-4

(Mail and Wire Fraud: 18 U.S.C. §§ 1341 and 2)

1. Paragraphs 1 through 46 of the General Allegations of this Indictment and paragraphs 1-2 of Count 1 are incorporated by reference herein.
2. From in or about September 2003 until in or about January 2005, the exact dates being unknown to the grand jury, in the Northern District of Ohio and elsewhere, defendant MARK D. LAY, having devised and intended to devise a scheme and artifice to defraud the OBWC as to a material matter, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, (1) caused matters and things to be placed in any post office and authorized depository to be sent and delivered by the Postal Service and (2) caused matters to be delivered by commercial interstate carrier according to the direction thereon, for the purpose of executing and attempting to execute the scheme and artifice as set forth in Counts 3 and 4 below.

Mailings

3. On or about the dates set forth below, MARK D. LAY and others known and unknown to the Grand Jury executed and attempted to execute the scheme and artifice set forth above by causing and attempted to cause, in the Northern District of Ohio, Eastern Division, and elsewhere, the following matters and things to be mailed and delivered by commercial interstate carrier as set forth in each Count below:



COUNT	APPROXIMATE DATE OF MAILING	DESCRIPTION OF MAILING
3	April 15, 2004	Trade Confirmation concerning the sell of United States Treasury Bonds with maturity date of February 15, 2031 sold on April 15, 2004 by the MDL Active Duration Fund mailed from a Pershing LLC office in Jersey City, New Jersey to the office of Great Lakes Capital Partners Ltd. in Westlake, Ohio.
4	May 11, 2004	Trade Confirmation concerning the sell of United States Treasury Bonds with maturity date of February 15, 2031 sold on May 11, 2004 by the MDL Active Duration Fund mailed from a Pershing LLC office in Jersey City, New Jersey to the office of Great Lakes Capital Partners Ltd in Westlake, Ohio.

All in violation of Title 18, United States Code, Sections 1341 and 2.

The Grand Jury further charges:

#### FORFEITURE

The allegations of Counts 3 and 4 are hereby realleged and incorporated herein by reference for the purpose of alleging forfeiture pursuant to 18 U.S.C. §§ 981(a)(1)(C), 982 and 28 U.S.C. § 2461(c). As a result of the foregoing offenses, defendant, MARK D. LAY, shall forfeit to the United States any and all property, real and personal, that constitutes, or is derived from, proceeds obtained, directly or indirectly, or traceable to said violations; including, but not limited to, the following: A money judgment in the amount of \$1,793,231.00.

#### SUBSTITUTE PROPERTY

In the event that any property subject to forfeiture under 18 U.S.C. §§ 981(a)(1)(C), 982 and 28 U.S.C. § 2461(c), as a result of any act or omission of the defendant:

1. cannot be located upon exercise of due diligence;
2. has been transferred or sold to, or deposited with a third party;
3. has been placed beyond the jurisdiction of this Court;
4. has been substantially diminished in value; or,
5. has been commingled with other property which cannot be divided without difficulty,

it is the intent of the United States, pursuant to 21 U.S.C. § 853(p) [as incorporated by 18 U.S.C. § 982(b)], to seek forfeiture of any other property of the defendant, up to an amount equivalent to the value of the property forfeitable under 18 U.S.C. §§ 981(a)(1)(C), 982 and 28 U.S.C. § 2461(c).

**A TRUE BILL**

Original document – Signatures on file with the Clerk of Courts, pursuant to the E-Government Act of 2002.